

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Writ Petition No. 1495 of 2001 (M/B)
Old No. 14258 of 1998

Date of decision: 5th November, 2004

For the approval of:

Hon'ble Chief Justice V.S. Sirpurkar.

Hon'ble Mr. Justice Irshad Hussain.

- 1- Whether the order/Judgement should be sent to the reporters for reporting? (yes)
- 2- Whether the reporters be allowed to see the judgment? (yes)

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IN THE HIGH COURT OF UTTARANCHAL, NAINITAL

Writ Petition No. 1495 of 2001 (M/B)

Old No. 14258 of 1998

M/s Heena Suppliers and Transporters,
Mall Road, Nainital
Through Sri Nasir Khan,
the proprietor & another Petitioners

Versus

Nagar Palika Parishad,
Nainital & another. Respondents.

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Mr. Alok Singh, Sr Adv., a/b Mr. H.V. Shah, learned counsel for the petitioners.
Mr. Sudhanshu Dhulia, Sr. Adv. a/b Mr. D.S. Patni, learned counsel for the
respondent No. 1.

Coram: Hon'ble V.S. Sirpurkar, C.J.,
Hon'ble Irshad Hussain, J.

Dated: November 05, 2004

(Per Hon'ble the Chief Justice)

1. This writ petition was initially filed at Allahabad, where it was registered as writ petition No. 14258 of 1998. After the formation of State of Uttaranchal, the matter has come before this Court.

2. Shortly stated, the petitioners seek a mandamus commanding the respondents i.e. Municipality, Nainital and the State of U.P. not to realise the license fee for passing and re-passing on the municipal roads in the municipal area of Nagar Palika Parishad, Nainital. They also seek quashing of the Notification dated 1.11.1997, whereby the amended rates of such fees are published.

3. By this Notification dated 1.11.1997, the light vehicles would carry Rs. 500/-, which was the old rate also, while for the taxi cars and the commercial vehicles, instead of Rs. 1,000/-, Rs. 1500/- would be charged. The fees in respect of Mini Bus, Mini Trucks, Metador, D.C.M. Toyota, Canter etc. was increased from Rs. 1,000/- to Rs. 3,000/-. The petitioners have made out this case as a public interest

litigation. The petitioner No. 2, admittedly, carries the business of the transporter, for which purpose, he owns the trucks, buses and taxies. The main claim in the writ petition is that the bye-laws were framed by the respondent Municipal Council under section 298 of the U.P. Municipalities Act, 1916, where under bye-law 12, it is provided that no motor vehicle, except those mentioned in the said bye-law, would be driven beyond Tallital Lake Bridge on any road in the city other than the road leading from the Lake Bridge to the road bend below Rock House in the South Mall without a permit from the President, Municipal Board, which may be granted within certain specified hours on payment of fees and on such terms and conditions as the President prescribes. It is then pointed out that the rates, which were originally provided in the said bye-law of the licensing fees, were increased as stated above.

4. It is, then, further contended that the said amendment was illegal as it was made without complying with the legal requirements mentioned in Section 129 to 135 of the Municipalities Act as well as Section 301 of the said Act. It is, then, contended that the petitioners had so far been paying the said license fees. However, now the petitioners have been advised that the respondent No. 1 has no right under the Municipalities Act to levy any such fees, as it is not the respondent Municipality, which maintains the said roads. It has only the duty to install the electric lights and clean the roads. It is, then, asserted that the activities done by the Municipality are statutory in nature and the municipality cannot levy any licensing fees. It is, then, suggested that this is not a fee, but a tax for which there is no legal sanction.

5. In short, the contention is that even if the respondent No. 1 does some act and provides any services, it is only the statutory duty and therefore, no fees could be levied. Reliance is placed on Section 298 List I (H)(b) of the said Act and it is contended that under the said entry, no power is conferred on the respondent No. 1 to levy any such

fees, which is exorbitant in nature. Section 298 (E)(b) has also been mentioned in the writ petition and it is asserted that under that section also, there is no power to the Municipality to levy any fees. So also Section 298 List II (H)(p) is mentioned to suggest that even that section does not create any authority. Lastly, a reliance is placed on article 301 of the Constitution of India and it is suggested that the said illegal fees realised by the respondent No. 1 is in contravention of that article. Lastly, a reference is made to a Division Bench judgment passed by the Allahabad High court, whereby the bye-laws No. 4 and 6 passed by the City Board, Mussoorie were struck down.

6. As against this, the Municipality asserts that firstly, the writ petition, itself, is not a bonafide writ petition, as it cannot be said to be a public interest litigation. It is suggested that the petitioners are clearly interested because of their self-interest and thus, there are no bonafides in the petitioners. Even otherwise, on the question of validity of the bye-laws, it is asserted by the Municipality that it has all the powers to frame the bye-laws and that the said bye-laws and more particularly, the amendments thereto, are in keeping with the provisions of the Act and very significantly those, which have been mentioned by the petitioners, themselves, in the writ petition. In addition to this, the Municipality has asserted that it gives various services and this being a tourist attraction, it has to cater to the ever-increasing population of the tourists. In that it has to provide number of amenities, for which the Municipality is justified in levying the fees. In short, the Municipality is justified in levying the fees for the services that it provides in respect of the roads.

7. On this conflicting background, it is to be seen as to whether the Municipal Council was justified in passing the bye-laws and whether those bye-laws are validly passed and can be relied upon by the Municipality to realise the fees and whether the petitioners are right in invoking the maxim of quid pro quo and whether they are right in contending that there is no justification for charging the

increased fee or for that matter, any fee at all. It will be, therefore, our endeavour to see as to whether the petitioners can successfully challenge the fees on the tow grounds, namely:

- i. The application of the principle of quid pro quo in respect of the fees charged by the Municipality and the services provided by the same.
- ii. As to whether the Municipality is justified in levying the fees at all and was, further, justified in increasing the same and whether it was within the powers of the Municipality under the provisions of the U.P. Municipalities Act, 1916 to increase the said fees?

8. We shall, first, consider the question of quid pro quo. According to Mr. Alok Singh, learned senior counsel appearing on behalf of the petitioners, this so-called license fee was in the nature of a tax and not a fee. The learned counsel suggested that there was no justification for levying such a tax. The contention raised was that this was not a fee, but a tax as firstly, there was no quid pro quo between the fee charged by the respondent Municipality and the services rendered to the persons affected like the petitioners.

9. This question, as to whether a particular fee can be said to be a tax there being no quid pro quo in the services provided, has been considered in the case of Secunderabad Hyderabad Hotel Owners' Association & others Vs Hyderabad Municipal Corporation, Hyderabad & another reported in 1999(2) Supreme Court Cases 274. There also a fee, charged for a trade license for running a lodging house, hotel, restaurant, coffee house, tea stall, eating house etc., was challenged on the same ground that there was no quid pro quo and therefore, the fee amounted to the tax. The Supreme Court took the view that a license fee could be regulatory or compensatory and it is only when the fee is charged for rendering specific services, there is a certain element of quid pro quo between the services rendered and the

fee charged so that the license fee should be commensurate with the cost of rendering the services although exact arithmetical equivalence is not to be expected. The Court, then, went on to say that where, however, the license fee is of regulatory nature, the fee charged for regulation of such activity could be validly classifiable as a fee and not a tax although no services is rendered. It was clearly held that for such a regulatory fee, there can be no element of quid pro quo or for that matter, even if the quid pro quo is not to be found in case of such fees, such fees can, by itself, not become the tax.

10. Mr. Sudhanshu Dhulia, learned senior counsel appearing on behalf of the respondent Municipality very heavily relied on the above judgment and pointed out that the fee, by its very nature, was regulatory, though he further asserted that even otherwise, the respondent No. 1 was rendering number of services, for which also, such a fee was justified. Our attention was specifically drawn to the fact that Nainital being a tourist attraction and there not being any other approach to this hill city, the tourists have to come only by the motor vehicles. It is pointed out that there is no Railway facility and the only nearest Railway Station is about 37 Kms. Away from Nainital. It was pointed out that though the permanent population of Nainital is below one lac, the floating population is very heavy particularly in the tourist season. It is pointed out by Mr. Dhulia, further, that there are three types of tourist seasons. The first season, being summer season, starts in the month of March and ends only with the beginning of the month of July. The second seasons starts and lasts for two or two and a half months starting from the month of October. According to the learned counsel, even during the winters, when it sometimes snows, people come to enjoy even during the months of December and January. The learned counsel was at pains to point out that the number of visiting tourists goes in several lacs and adequate arrangements have to be made in the nature of sanitation, cleanliness, availability of the facilities like maintaining the roads going to the picnic spots, providing clean drinking water,

providing adequate lighting, maintaining the other tourist attractions like playgrounds, theatres, maintaining the food standards and the decency standards in the restaurants etc. Mr. Dhulia, therefore, contended and in our view, rightly, that the Municipality has to provide number of services, particularly, in view of the floating tourist population. It cannot, also, be ignored that the Municipality has also to arrange for the parking of the vehicles and at times, there are thousands of vehicles plying in the city of Nainital. Therefore, it cannot be said that there is no service provided, at all, by the Nainital Municipality.

11. However, Mr. Alok Singh, learned senior counsel asserts that the services are only to the tourists and not to the local public like the petitioners and therefore, the Municipality will not be justified in charging the fees from the locals. We fail to understand the argument. If the facilities are used by the tourists, they are also used by the locals. It is not as if the facilities provided by the Municipality are made only for the tourists and for that matter, we cannot forget that the economy of this city, itself, depends upon the income from the tourists, which benefits the local population also. Therefore, this is not a case that there are no services provided. But again, as has been observed by the Supreme Court, there need not be a strict quid pro quo between the services offered and the fees collected and further the principle of quid pro quo is completely pushed to the background, where the fee is in the nature of a regulatory fee.

12. There can be no dispute that the fee, in this case, is of regulatory nature. After all, this being a hill city, there is a dearth of space or as the case may be, of land and because of the existence of a pristine lake, which is the major attraction for the tourists, the whole population is concentrated around the lake on the two hills between which, the said lake is located. The Mall Road, which runs between Mallital and Tallital, is by far the only road, over which, the hotels and the restaurants are located. To cater to the tourists' requirements

needs number of other shops like furniture shops, medicine shops, cosmetic shops, the shops for the clothes etc., which are located on that very road. This is not to speak of the main shopping complex, which is at the end of the said Mall Road. All this, undoubtedly, caters to the heavy traffic on the Nainital roads for which it is necessary for the Municipality to regulate the same taking into consideration the safety as well as the convenience of the tourists. When we see the provisions of the U.P. Municipalities Act, 1916, Section 298 Power of Municipality to make bye-laws should be consistent with the Act or with any Rule. Bye-laws have to be made for the purpose of permitting maintaining the health, safety and the convenience of the inhabitants of the municipal area and for the furtherance of Municipal Administration under this Act. Sub-section 2 of Section 298 of the U.P. Municipalities Act, 1916, power of Municipality to make bye-laws is more important, which is as under:-

2) In particular, and without prejudice to the generality of the power conferred by sub-section (1), the [Municipality], wherever situated, may in the exercise of the said power, make any bye-law described in List I below and the [Municipality], wholly or in part, situated in a hilly tract may further make, in the exercise of the said power, any bye-law described in List II below”

Therefore, it will be clear that there is a general power to pass bye-laws for the purposes stated in sub-section I, in case of the Municipality generally and Municipalities in the hilly tract have added powers to pass bye-laws described in List II.

Our attention was drawn firstly, to List I, which is meant for the general municipalities under sub head E-Streets. More particularly to clause (b) thereto which is as under:-

(b) permitting, prohibiting or regulating the use or occupation of any or all public streets or places by it inerrant-vendors, or by any person for the sale of articles, or for the exercise of any calling or for the setting up of

any booth or stall, and providing for the levy or fees such use or occupation:”

Secondly, our attention was drawn to sub-head H – Public safety and convenience. Again sub clause (b) of sub- head H, provides as under:-

(b) providing for the regulation or prohibition of any description of traffic in the streets where such regulation or prohibition appears to the [Municipality] to be necessary.

It is the contention of the learned counsel for the respondents that when these entries are read together it provides that the Municipal Corporation has power to pass the bye-laws for regulating the traffic in the streets. Learned counsel contended and in our opinion rightly that by charging the fees for entering the Mall road or other important roads the Municipality was also trying to create a deterrent so that too many vehicles are not plied on the busy street between Tallital and Mallital and also on the other streets.

Learned counsel also invited our attention to List II which is under head – Further Bye-laws for a Hill Municipality and invited our attention on entry H – Public safety and convenience. Our attention was again drawn to entry (p) which is as under:-

(p) regulating the rule of the road

He also invites our attention to entry (q) which reads as under:-

(q) rendering licences necessary within the municipal area

- (i) for persons working as job porters for the conveyance of goods:*
- (ii) for animals, vehicles and other conveyances let out on hire for a day or part thereof: and*
- (iii) for persons impelling or carrying such vehicles and other conveyances:*

The contention is that we should read the entries in H (p) and H (q) of the List along with the aforementioned entries in List I under H (b), which would clothe the Municipalities with the power to levy fees

(b), which would clothe the Municipalities with the power to levy fees over the vehicles which are plied on the Mall road and other roads of Nainital. In fact, the learned counsel suggests that clear-cut in section 298 and the entries therein suggests that these are the regulatory powers of the Municipality for which the fees could be levy by the municipality.

The learned counsel also points out that even under Section 293, the Municipality could charge the fees fixed by bye-laws for the use or occupation of any immovable property vested in for or entrusted to the management of the Municipality including any public streets or place of which it allows the use or occupation whether by allowing projection thereon or otherwise.

16. Reading all these provisions together, we are left with no doubt that there was no dearth of power with the Municipality to amend the bye-laws as it did. We also cannot ignore the fact that Nainital Municipality is one of the oldest Municipalities being in existence since 1850 or as the case may be since 1882. These bye-laws were framed way back on 14.02.1917, more particularly under the Uttar Pradesh Municipalities Act, 1916 and they have also been confirmed by the Government under section 301 of that Act. It is only when the fees was hiked that the same came to be challenged. Initially, under the Bye laws 8 and 12, subject of the motor vehicles plying on the Mall Road was tackled. It is only when the fees was hiked that the challenge of legislative competence has come up. In view of the long life of these bye-laws also, we do not find fault with these bye laws on the grounds stated by the petitioners.

17. Mr. Alok Singh, learned Senior Counsel for the petitioners took us to the Entry no. 57 and 59 of the List II of the seventh Schedule of the Constitution of India, where under the State Legislature is competent to impose taxes on vehicles and tolls. It is pointed out by the learned counsel that the toll tax, octroi and terminal taxes came to be abolished by the erstwhile undivided State of U.P. under the Uttar

Pradesh Urban Local Self-Government Laws (Amendment) Act, 1991, which was passed under the powers vested in the State Legislature under Article 243. It was pointed out that under the United Provinces Municipalities Act, 1916, there was specific power under section 128 and more particularly under clauses (vii), (viii) and (xiv), whereby it was possible to frame bye-laws for providing taxes on vehicles, animals, conveyances, etc. and that under the proviso, it was specifically provided that no tax under clause (iv) of sub-section (1) of section 128 could be levied in respect of any motor vehicle. Learned counsel then contended that even this taxing power was totally abolished by amending the said Act vide U.P. Urban Local Self-Government Laws (Amendment) Act, 1991, more particularly by section 2 and 20 therein. Section 20 speaks in clear terms that from August 1, 1990, there will be complete abolition of octroi or toll, which were referred to in clause (vii), (viii), (xiii), (xiv) of sub section(1) of section 128 and thereby the power of Municipality came to an end to levy and octroi or toll tax.

18. The argument, therefore, is that there was no particular power with the Municipality under the undivided State of U.P. after 1991 amendment of the aforementioned U.P. Urban Local Self-Movement Laws (Amendment) Act 1991. The argument is undoubtedly very attractive. However, there is complete answer to this argument inasmuch as in the erstwhile section 128 of the U.P. Municipalities Act, 1916, which speaks about the Municipal Taxation as it existed before the amendment, there was no taxation the motor vehicle at all by reason of the proviso to section 128, to which we have made a reference earlier. When we see the clauses (iv), (vii), (viii), (xii), (xiii), etc., they speak not regarding the tax on any motor vehicles, but deal with the entirely different subjects. For example, clause (iv) speaks about tax on vehicle and other conveyances plying for hire or kept within the municipality or on boats moored therein; clause (vii) speaks about toll on vehicle and other conveyance, animals, and laden coolies entering the municipality; and clause (xii) speaks about the

conservancy tax for the collection, removal and disposal of excrementitiously and polluted matter privies, urinals, cesspool, while clause (xiii) speaks about the tax on goods. Thus, it could be deduced that there can be no tax on vehicles under clause (iv) and by bringing in amendment under the U. P. Urban Local Self-Movement Laws (Amendment) Act 1991, the power to levy toll or octroi was also completely abolish. However, it cannot be ignored that there is an independent power under section 298, more particularly in respect of Municipalities situated in the hills under which there could be bye-laws in respect of the items described in List II, with which we have dealt earlier. In our opinion, the language of section 298 of the U.P. Municipalities Act, 1916 read with list II – H (p), is wide enough as List II and more particularly 298- H, pertains to public safety and conveniences. We have already held that Nainital being hill city and there being substantial tourist traffic, entry (n) and (p) of List II- H, would also confer sufficient power under section 298 (2) on the Municipality. We also cannot ignore the language of that sub-section, because it starts with the words “ In particular, and without prejudice to the generality of the power conferred by sub-section (1)”. We have also shown that even List I-H pertains to public safely and convenience again and the entry (b) therein provides enough power for regulation or prohibition of any description of traffic in the streets where such regulation or prohibition appears to be necessary. We would, therefore, have to read as rightly suggested by learned counsel for the respondent Mr. Sudhanshu Dhulia, these entries in List I and II together and not disjunctively. The totality of the power could thus be found in section 298 (1) and (2) in List I-H entry (b) as also list II – H entry (n) and (p). We are, therefore, of the clear opinion that there was enough power. It is trite law that such entries which create power to legislate have to be given widest scope. We propose to be guided by that principle while interpreting aforementioned entires.

18. However, Mr. Alok Singh, learned counsel for the petitioners, has heavily relied on the judgment of the Allahabad High Court

reported in 1970 All. L.J. 249 Chaudhary Attar Singh Vs. State of Uttar Pradesh as also in another judgment reported in 1987 (13) ALR 732 – Om Prakash Vs. Municipal Board, Debai, Bulandshahr, which is a Division Bench judgment of that Court. We will take up for consideration Chaudhary Attar Singh's case first. It is quite true that it is held considering section 298-H (b) that this entry does not touch the subject-matter of entry of vehicles into the municipal areas, and it is further held that bye-laws were not related to traffic in the streets of the municipal area, much less for regulating or prohibiting the same, nor do they contemplate that the motor vehicles of the kind mentioned in the impugned bye-laws would not enter the streets, in stated period of times, when the traffic may be usually heavy on the streets without paying the requisite fee, and the fee is chargeable at any time without consideration of the condition of the traffic on the street and as such bye-laws were unsustainable, particularly u/s 298-H (b). We have gone through the judgment carefully. However, this was not a judgment as regards to Municipality, like the present in question. That was a Kairana Municipality, which was not governed by second part of section 298 (2). What fell for consideration in that judgment were the bye laws providing for entry of loaded motor buses/tractors or loaded taxis in the Municipal area of Kairana. What falls for consideration here in the present bye-laws, are the charges for user of the Municipal roads and more particularly the Mall Road. As we have pointed out, in the city of Nainital there are very few roads, like the Mall and the one passing to the Governor House and for using these two roads, the maintenance of which is extremely important in view of this being a tourist city, bye-laws provided for the fee of regulatory nature. Such was not subject before the learned Judge of the Allahabad High Court. When we closely see the facts, what is challenged, is hike in the fee, which is normally paid by the citizens, who use these two roads, and indeed there are hardly any other roads. Those who wish to pass through the Mall road have to pay fees for using that road between Tallital and Mallital. There could still be a case where a person might bring his vehicle from outside, keep it on

the Haldwani road or Almora Road and though he has entered the city of Nainital, he might not be required to pay toll at all, because if he does not use the road between Tallital and Mallital or as the case may be road going to Governor House, he is not required to pay anything. Such was not the case in Caudhary Attar Singh' case. There, vehicle entering in the Municipal area was required to pay fee. In our opinion, therefore, the law laid down in that case will not apply in the present case.

In the other case relied upon by the learned counsel for the petitioners, reported in 1987 (13) ALR 732 – Om Prakash Vs. Municipal Board, Debai, Bulandshahr, the situation was similar. There the Division Bench considered the case of *Tahbajari* in respect of motor vehicles entering the Municipal limits, more particularly entering enroute to some other place. We have seen the judgment closely, in which a reference is made to Chaudhary Attar Singh's case as also Sagir Ahmad Vs. State of U.P. reported in AIR 1954 SC 728. The view is taken after considering section 220 and section 298 (2) E of the List I of the Act, that the Municipal Board has no power to frame bye laws on the entry under those sections. Even the case of Jagdish Chandra Vs. State of U.P. reported in 1975 ALJ 571 is considered in this judgment, wherein it was held that the Board could not charge a fee for permitting the vehicles to be parked at a place other than a bus stand. We are afraid that even these cases cannot help the petitioners for the same reason that they pertain to entry of the vehicles into the Municipal limits. In the latter case of Om Prakash Vs. Municipal Board, Debai, Bulandshahr, the factual situation is entirely different. That case also does not deal with the Hill Municipality contemplated in section 298 (2). We are, therefore, of the clear opinion that these two cases do not apply at all.

19. Almost by way of desperate argument, learned counsel invited our attention to Article 243-X of the Constitution of India and contended that the Municipality could levy taxes, duties, tolls and fees only in accordance with the Legislature of the State, which may

authorise the Municipality to do so and that there has to be a State legislation authorizing the Municipality to levy taxes, duties, tolls, fees, etc. We fail to see the implication of the argument because there is already Act being U.P. Municipalities Act, 1916, which also applies to the State of Uttaranchal and under Article 243-ZF, any law relating to Municipalities could continue at least for one year, even if it is inconsistent with the provisions of Part IX-A of the Constitution of India. In spite of best efforts, learned counsel could not show any inconsistency of U.P. Municipalities Act, 1916 and part IX-A of the Constitution of India. The argument, therefore, is of no significance and must be rejected.

20. We are, therefore, of the clear opinion that on both the grounds alleged, the petition must fail. The petition is dismissed accordingly.

(V.S.Sirpurkar, C.J.)

(Irshad Hussain, J.)

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